IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
SEP 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut,

Petitioner,

v.

NOWELL A. BRATHWAITE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether evidence of an unnecessarily suggestive out-of-court confrontation is subject to a strict rule of exclusion at trial.

2. Whether the court of appeals exceeded the proper scope of appellate review in holding that the photographic identification procedure used to obtain an identification of respondent gave rise to a substantial likelihood of mistaken identification.

STATEMENT OF THE CASE

A. HISTORY OF THE PROCEEDINGS.

After a jury trial in Connecticut Superior Court in Hartford, Connecticut, respondent Nowell Brathwaite was found guilty, on January 14, 1971, of possession and sale of heroin, in violation of §19-481a and §19-480a, Connecticut General Statutes (Rev. of 1958, as amended 1969), and was sentenced on February 5, 1971 to a term of imprisonment of not less than six nor more than nine years. Respondent's conviction was affirmed by the Connecticut Supreme Court on April 5, 1973. *State* v. *Brathwaite*, 164 Conn. 617, 325 A.2d 284 (1973) [Pet. App. pp. 1a-4a].

On June 28, 1974, respondent filed a petition for a writ of habeas corpus in the United States District Court in Hartford, alleging that the erroneous admission of identification testimony at his trial had violated his right to due process of law. The petition was dismissed by the district court, Blumenfeld, J., in an unreported written opinion [*Memorandum of Decision*, Pet. App. pp. 5a-11a], filed on May 13, 1975, based on the court's review of the trial transcript.[1]

Respondent appealed to the United States Court of Appeals for the Second Circuit, which court, Friendly, J., reversed the judgment of the district court and ordered the State either to retry or release respondent. *Brathwaite* v. *Manson*, 527 F.2d 363 (2d Cir. 1975) [Pet. App. pp. 12a-27a].

[1] Neither party to this action requested an evidentiary hearing in the district court on respondent's claims. *See* Mem. of Dec., *supra*, at 8a n.10.

From this decision, rendered on November 20, 1975, petitioner applied to this Court for a writ of certiorari. On May 3, 1976, certiorari was granted. *Manson* v. *Brathwaite*, ____ U.S. ____, 96 S. Ct. 1737 (1976).

B. STATEMENT OF THE FACTS.

On May 5, 1970, at 7:45 p.m., police undercover agent James Glover and his informant Henry Brown went to an apartment building at 201 Westland Avenue, Hartford, Connecticut [T. 24, 25],* for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer who lived in an apartment on the left side of the third floor [T. 45, 68]. Glover and Brown entered the premises, observed by back-up officers Michael D'Onofrio and William Gaffey, but by mistake went to the wrong apartment, knocking on the door on the right side of the third floor [T. 26, 55].

Glover and Brown described the ensuing events in the building differently.

Glover testified that in response to his knock, the door was opened twelve to eighteen inches, revealing an unknown black male and female [T. 29]. Glover asked the man for two bags of heroin, which the man agreed to sell him [T. 29-30]. The door was closed and remained shut for approximately three minutes [T. 31], presumably while the heroin was prepared for sale in the apartment [T. 30]. The door was then reopened, and an exchange took place with the same man [T. 32]. The door was closed immediately thereafter

*References denoted by "[T.]" are to the state trial transcript, on file as part of the Record before this Court.

[*Id.*]. Glover and Brown then departed the building [*Id.*], three or four minutes after entering [T. 60]. There was no artificial light in the hallway or the apartment, although some natural light came in through the windows that evening [T. 28, 33].

Brown testified that the exchange had taken place with a black woman, not with a black man [T. 87].

After the transaction was completed, Glover and Brown left the building. At 7:53 p.m., eight minutes after their initial arrival outside the premises, Glover radioed Gaffey that the transaction had been completed [T. 11]. Glover then drove to police headquarters where he gave a description of the seller to D'Onofrio [T. 36]. Glover did not know the identity of the seller at this time [*Id.*].

That evening, D'Onofrio proceeded to the Records Division of the Hartford Police Department [T. 63]. Suspecting that Brathwaite might be the seller, D'Onofrio secured one photograph of Brathwaite to show to Glover [T. 63, 65, 70]. Although neither Glover nor D'Onofrio knew Brathwaite personally [T. 36, 63], and although D'Onofrio was furnished with only a general description of the seller [T. 36], only one photograph of Brathwaite was selected by D'Onofrio from the extensive police files for viewing by Glover [T. 63, 65]. The picture had been taken of Brathwaite in connection with a breach of the peace charge [T. 70].

Two days later, Glover looked at the isolated photograph of Brathwaite and identified Brathwaite as the person from whom he had purchased the heroin [T. 38]. No explanation was given for the failure to utilize a full photographic array or conduct a line-up proceeding, although D'Onofrio did testify that a

photographic show-up[2] is not an unusual procedure [T. 70-71].

At trial, the only evidence linking Brathwaite to the crime was the photographic identification made by Glover on May 7, 1970, and an in-court identification made by Glover during trial on January 8, 1971 [T. 33, 38; *See Mem.* of *Dec.*, *supra*, at Pet. App. 6a]. In the eight months between the crime and the trial, Glover had not seen the seller again in person [T. 41]. Prior to testifying, Glover had again viewed Brathwaite's isolated photograph.[3]

Brathwaite testified that he had been ill at his apartment on Albany Avenue, Hartford on the day in question and at no time that day had been at 201 Westland Avenue [T. 106]. His wife, Eleanor Mae Brathwaite, confirmed that Brathwaite had in fact remained home that day with her [T. 165]. Dr. Wesley Vietzke testified as to Brathwaite's medical condition at the time, corroborating Brathwaite's testimony [T. 131].

Brathwaite had immigrated to America in March 1965, and was a native of Barbados in the British West Indies [T. 99]. On May 5, 1970, Brathwaite was suffering from a facial tic [T. 138-39].

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[2] The phrase "photographic show-up" shall be used to describe an identification proceeding in which an individual is shown one photograph or photographs of only one suspect and is asked to make an identification therefrom.

[3] Although the trial transcript does not reflect this second viewing, petitioner's counsel, who was also counsel for the State at trial, admitted at oral argument in the court of appeals that Glover had again viewed respondent's photograph prior to testifying.

SUMMARY OF THE ARGUMENT

A

A strict rule of exclusion of out-of-court identification evidence derived from unnecessarily and impermissibly suggestive post-*Stovall* confrontations is constitutionally mandated, without regard to the reliability of such evidence, in order to safeguard the Fifth and Fourteenth Amendment right to a fair trial.

The primary purpose of the rule is deterrence of improper identification procedures. The rule also minimizes the risk that unreliable out-of-court identification evidence obtained as a result of suggestive procedures will be mistakenly and improperly presented to the fact-finder.

Although a strict rule will, on occasion, require exclusion of reliable identification evidence, such exclusion does not significantly impede the effective prosecution of guilty defendants. Unlike tangible evidence, excluded identification evidence can be easily replaced by other out-of-court confrontation evidence and/or an in-court identification, with little, if any, dimunition in the probative force of a prosecution. If the original identification was "reliable" in spite of the suggestive procedures used to obtain it, then an independent basis will always exist to validate admission at trial of the subsequent identification evidence.

Because the benefits of a strict rule significantly outweigh its costs, the court of appeals was correct in holding that such a rule is required to protect the due process right to a fair trial. The admission at respondent's trial of evidence of an unnecessarily suggestive confrontation was, therefore, error, requiring reversal of respondent's conviction.

B

The court of appeals did not exceed the proper scope of appellate review in holding, as an alternative basis for reversing respondent's conviction, that respondent's rights under the due process clause were violated by the admission at trial of unreliable identification testimony. Resolution of respondent's claims did not turn on factual determinations by the district court or the state trier of fact, but rather required assessment of the constitutional significance of established facts. Although the court of appeals disagreed with the district court's legal conclusion, it did not overturn any factual finding by the district court.

The court of appeals' conclusion that the photographic identification procedure employed gave rise to a substantial likelihood of misidentification was compelled by a proper application of the "totality" test to the facts of this case. The use of one photograph to obtain an identification is widely recognized to be extremely suggestive and was, in this case, wholly unjustified. The likelihood of misidentification as a result of this suggestiveness was especially great since the undercover agent had a limited opportunity, under poor lighting conditions, to observe the seller, and the agent's identification of respondent was not supported by other indicia of reliability.

Since respondent's conviction was based solely on the agent's identification testimony, and since, under the totality of the circumstances, a substantial likelihood of misidentification resulted from the photographic identification procedure employed, the court of appeals correctly held that admission of the identification testimony violated respondent's due process rights, requiring reversal of his conviction.

ARGUMENT

A. THE ADMISSION AT RESPONDENT'S TRIAL OF OUT-OF-COURT IDENTIFICATION EVIDENCE DERIVED FROM AN UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC SHOW-UP VIOLATED RESPONDENT'S RIGHT TO DUE PROCESS OF LAW.

Respondent Brathwaite was convicted at his Connecticut state court drug trial on the basis of identification testimony derived from a photographic identification procedure found by the court of appeals, and now conceded by petitioner in his brief to this Court,[4] to be unnecessarily and impermissibly suggestive. As the first ground for reversing respondent's conviction, the court of appeals, Friendly, J., held that such out-of-court identification evidence is subject to strict exclusion at trial, without regard to its reliability, and found its admission at respondent's trial to violate respondent's rights under the due process clause. The validity of this holding represents the principal issue presented for review by this Court.

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court first recognized that the constitutional right to a fair trial is jeopardized when identification evidence of questionable reliability derived from suggestive confrontation procedures is presented to the fact-finder and serves as the basis for conviction of a defendant. While *Stovall*, and subsequent cases, *Foster* v. *California*, 394 U.S. 440 (1969); *Neil* v. *Biggers*, 409 U.S. 188 (1972), have established that such evidence is subject to

[4] Brief of the Petitioner, p. 10.

exclusion at trial on due process grounds, the Court has not, to the present time, had occasion to formulate the scope of the exclusionary rule applicable to post-*Stovall*, out-of-court identification evidence.[5]

In the absence of clarification by this Court, lower courts have responded to *Stovall* with two distinct rules of exclusion for out-of-court identification evidence. *Compare Brathwaite* v. *Manson*, *supra*, and *Smith* v. *Coiner*, 473 F.2d 877 (4th Cir.), *cert. den.*, *Wallace* v. *Smith*, 414 U.S. 1115 (1973), with *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397 (7th Cir.), *cert. den.*, 421 U.S. 1016 (1975). These rules, while both attempting to insure the reliability of identification evidence admitted at trial, seek to attain that objective in different ways. *See* generally Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1111-1114 (1974).

The first rule, the strict rule of exclusion proposed by the court of appeals in the instant case, focuses on the procedures employed to obtain an identification and requires exclusion at trial of out-of-court identification evidence, without regard to its reliability, whenever it has been obtained through unnecessarily

[5] In *Stovall*, the Court upheld the confrontation procedures employed and thus was not required to explicate the appropriate exclusionary rule. The instant case marks the first case in which the Court has agreed to review a due process challenge to post-*Stovall* out-of-court identification evidence. In *Foster* v. *California*, 394 U.S. 440 (1969), and *Neil* v. *Biggers*, 409 U.S. 188 (1972), the confrontations occurred prior to June 12, 1967, the day *Stovall* was announced. In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), and *United States* v. *Ash*, 413 U.S. 300 (1973), the Court did not review the due process issue. In *Coleman* v. *Alabama*, 399 U.S. 1 (1970), and *Simmons* v. *United States*, 390 U.S. 377 (1968), out-of-court identification evidence was not admitted at trial.

suggestive confrontation procedures. The rule is designed to insure that evidence of uncertain reliability is not presented to the trier of fact and, equally important, is intended to deter the use in the future of improper identification procedures. *Id.*; *Brathwaite* v. *Manson, supra,* at 371; *Smith* v. *Coiner, supra,* at 882.

The second rule, a selective or "totality" rule, looks to the reliability of an identification derived from suggestive procedures, allowing admission of the confrontation evidence if, in spite of the suggestiveness, the out-of-court identification is likely to be reliable. The rule is premised on the assumption that judges are capable of measuring, with sufficient precision, the impact of suggestiveness on a resulting identification and determining, on a case-by-case basis, when suggestive procedures have in fact produced a mistaken identification. The rule is not designed to have a deterrent impact, but rather attempts to limit the cost imposed by a sanction that excludes evidence from the trier's consideration. *United States ex rel. Kirby* v. *Sturges, supra*, at 407-8.

After *Stovall*, and prior to 1972, courts generally held that strict exclusion of improperly obtained, post-*Stovall* confrontation evidence was constitutionally mandated for deterrent reasons. *See, e.g., United States* v. *Fernandez*, 456 F.2d 638, 641-42 (2d Cir. 1972); *Kimbrough* v. *Cox*, 444 F.2d 8 (4th Cir. 1971); *United States* v. *Fowler*, 439 F.2d 133 (9th Cir. 1971); *Mason* v. *United States*, 414 F.2d 1176 (D.C. Cir. 1969); *Russell* v. *United States*, 408 F.2d 1280, 1285 (D.C. Cir.), *cert. den.*, 395 U.S. 928 (1969). Noting *Stovall*'s focus on the justification for the suggestive hospital show-up upheld in that case, *Stovall, supra,* at 302, and drawing on the constitutional force given to the Court's concern with deterrence in *United States* v. *Wade*, 388 U.S. 218, 235 (1967), and *Gilbert* v. *California*, 388

U.S. 263, 272-4 (1967), lower courts concluded that out-of-court identification evidence derived from unnecessarily suggestive confrontation procedures was subject to strict exclusion at trial, without regard to its reliability. *Id. See Clemons* v. *United States*, 408 F.2d 1230, 1237 (D.C. Cir. 1968) (*en banc*), *cert. den.*, 394 U.S. 964 (1969).

In 1972, in *Neil* v. *Biggers*, 409 U.S. 188 (1972), the Court held that evidence of an unnecessarily suggestive confrontation conducted *prior to Stovall* was admissible at trial because the resulting out-of-court identification was, under the totality of the circumstances, reliable. *Id.*, at 199. The Court recognized the deterrent value of a strict rule of exclusion of such evidence, but declined to apply such a rule to a pre-*Stovall* confrontation, since prior to *Stovall*, law enforcement authorities had no way of knowing that suggestive practices were subject to constitutional scrutiny, and thus the rule's deterrent purpose could not be served. *Id.* This position was consistent with the Court's previous determination that *Wade* and *Gilbert* should not be applied retroactively, *Stovall, supra*, at 296-301, and was also in harmony with the Court's refusal to hold other deterrent exclusionary rules retroactive. *See Desist* v. *United States*, 394 U.S. 244 (1969); *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

Neil left unstated the due process rule applicable to post-*Stovall* confrontations, recognizing that formulation of such a rule would require consideration of a deterrence factor and would not be constrained by the need, in *Neil*, for a narrow rule to limit interference with legitimate convictions involving improper pre-*Stovall* confrontation evidence. *See* Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 MICH. L. REV. 717, 776-9 (1974). Although lower

courts have, after *Neil*, applied a "totality" test to post-*Stovall* confrontations, such courts have generally failed to take heed of *Neil*'s retrospective thrust and the intentionally limited nature of the rule adopted in *Neil*. *Compare Stanley* v. *Cox*, 486 F.2d 48 (4th Cir.), *cert. den.*, 416 U.S. 958 (1973), with *Smith* v. *Coiner, supra*. But *see United States ex rel. Kirby* v. *Sturges, supra*.

In the instant case, involving a post-*Stovall* confrontation, the Court of Appeals for the Second Circuit was presented with the issue left open in *Neil*. Writing for a unanimous panel, and relying heavily on the prior decisions of this Court, Judge Friendly concluded that a strict rule excluding all out-of-court identification evidence derived from unnecessarily suggestive confrontation procedures is constitutionally mandated to deter improper practices and insure that innocent defendants will not be wrongfully convicted of crimes they did not commit.

Respondent respectfully submits that the holding of the court of appeals is correct and should be affirmed by this Court.

1. A Strict Rule of Exclusion Is Constitutionally Mandated for Deterrent Purposes.

It has been noted that "[t]here is surprising unanimity among scholars in regarding [a strict rule of exclusion at trial of evidence derived from an unnecessarily suggestive confrontation] as essential to avoid serious risk of miscarriage of justice." *United States ex rel. Kirby* v. *Sturges, supra*, at 405-06. Legal commentators have vigorously urged adoption of such a rule,[6] and the American Law Institute has included a

[6] *See* Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 MICH. L. REV. 717, 782-783 (1974); Pulaski, *Neil* *(continued)*

rule requiring strict exclusion in its Model Code of Pre-Arraignment Procedure.[7] Experienced federal judges, including the chief judges of two circuits, have also supported such a rule.[8]

The primary purpose of a strict exclusionary rule is deterrence of improper identification practices. This Court has consistently recognized that because suggestiveness is often so difficult to detect, and its impact so uncertain once detected, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the [confrontation] itself." *Wade, supra*, at 235. The preeminence of a deterrent factor is revealed not only

(footnote continued from preceding page)
v. *Biggers; The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1113 (1974); Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pretrial Criminal Identification Methods*, 38 BROOK. L. REV. 261, 291 (1971); *Recent Developments, Identification: Unnecessary Suggestiveness May Not Violate Due Process*, 73 COLUM. L. REV. 1168, 1180 (1973); Note, *Pretrial Identification Procedures–Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779, 794 (1971).

[7] Model Code of Pre-Arraignment Procedure, Sections 160.1, 160.2, 160.7(2) (Tent. Draft No. 6, 1974). *See* also Arizona State University College of Law, Model Rules for Law Enforcement: Eyewitness Identification (1972).

[8] Chief Judges Bazelon, in *Wright* v. *United States*, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, C.J., dissenting), and Kaufman, in the instant case, are joined by Judge Winter of the Fourth Circuit, Smith v. Coiner, *supra*, Judge Wright of the District of Columbia Circuit, Clemons v. United States, *supra*, at 1250 (Wright, J., concurring in part and dissenting in part) and arguably Judge McGowan, speaking for the *en banc* District of Columbia Court in *Clemons, see* United States ex rel. Phipps v. Follette, 428 F.2d 912, 914 n.3 (2d Cir.), *cert. den.*, 400 U.S. 908 (1970), as well as Judge Friendly, the author of the panel opinion herein.

in *Gilbert*, where deterrence explictly mandated adoption of a strict exclusionary rule, but in *Stovall* and *Foster* v. *California*, *supra*, as well, where the Court resolved due process challenges to out-of-court identification evidence by examining the suggestiveness of and need for the confrontation procedures employed, rather than the reliability of the out-of-court identification.[9] Indeed, in *Foster*, the Court explicitly rejected an inquiry into reliability, noting that "it is the teaching of *Wade*, *Gilbert*, and *Stovall*, *supra*, that in some cases the procedures leading to an eyewitness identification may

[9]In *Stovall*, the Court looked solely to the justification for the show-up procedure employed, finding no due process violation because the suggestive hospital confrontation had been necessitated by legitimate fears that the victim's critical condition would prevent a subsequent, less suggestive confrontation. Significantly, the Court made no mention in *Stovall* of the substantial evidence, including the victim's considerable opportunity to observe her attacker, that made misidentification unlikely. *See* United States ex rel. Stovall v. Denno, 355 F.2d 731, 733-4, 758 (2d Cir. 1966) (*en banc*). Similarly, in *Foster* v. *California*, *supra*, the Court found the repeated use of suggestive confrontation procedures by law enforcement agents seeking to obtain a positive identification to present "a compelling example of unfair line-up procedures." *Id.*, at 442.

Although the Court did focus on reliability in *Simmons* v. *United States*, *supra*, and *Coleman* v. *Alabama*, *supra*, these cases involved due process challenges to *in-court* identification evidence, and thus, following the reasoning set forth in *Wade*, looked to the existence of an "independent basis" for the in-court identification. Because there was no attempt to exploit a possibly improper confrontation by presenting at trial evidence of an out-of-court identification, the deterrent rationale was not applicable to resolution of the due process claims raised in *Simmons* and *Coleman*.

be so defective as to make the identification constitutionally inadmissible as a matter of law." *Id.*, at 442-3 n.2.

The need for deterrence recognized in prior cases is still substantial, *see* Grano, 72 MICH. L. REV., *supra*, at 723-24, as the facts of this case well illustrate. The photographic identification procedure employed in the instant case was explicitly criticized by this Court in 1968 in *Simmons* v. *United States*, 390 U.S. 377, 383 (1968), and has met with strident condemnation in lower courts as well. *See, e.g., Kimbrough* v. *Cox*, 444 F.2d 8, 10 (4th Cir. 1971); *United States* v. *Kimbrough*, 528 F.2d 1242 (7th Cir. 1976). Nonetheless, the procedure continues to be needlessly employed, and courts have faced repeated challenges to identification evidence derived from photographic showups. *Id.; see* also *Workman* v. *Cardwell*, 471 F.2d 909 (6th Cir.), *cert. den.*, 412 U.S. 932 (1972); *United States* v. *Cook*, 464 F.2d 251 (8th Cir.), *cert. den.*, 409 U.S. 1011 (1972); *United States ex rel. John* v. *Casscles*, 489 F.2d 20 (2d Cir. 1973), *cert. den.*, 416 U.S. 959 (1974); *United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975). Indeed, as one witness testified at respondent's trial, identification through use of one photograph is not at all unusual in Connecticut [T. 71].

The legislative regulations the Court had hoped *Wade* would engender, *Wade*, *supra*, at 239, have not been forthcoming to any great extent.[10] Connecticut, for

[10]*See* Pulaski, 26 STAN. L. REV., *supra*, at 1102 n.36. Indeed, Congress responded to *Wade* with legislation designed to overrule the Court's holding. 18 U.S.C. §3502 (1970). *See* generally Read, *Lawyers at Line-ups: Constitutional Necessity or Avoidable Extravagance*, 17 U.C.L.A. L. REV. 339, 360-7 (1969).

example, has recently adopted a code of criminal procedure that omits any standards for identification proceedings. *See* Connecticut Practice Book, chapter 65, §§2000-2433 (adopted June 7, 1976, to take effect October 1, 1976).

A "totality" rule cannot logically be expected to have a significant deterrent impact on identification practices. *See* Model Code of Pre-Arraignment Procedure, Commentary on Article 160, p. 427 n.13. Since, under such a rule, an out-of-court identification can, if it is "reliable," survive even the most improper identification procedure, a police officer or prosecutor will often have little incentive to adopt fairer procedures. Equally important, in cases where external factors do validate an identification derived from unnecessarily suggestive procedures, a law enforcement agent may not even know that the procedure used was improper or understand the limited reason the identification evidence was allowed. *Cf.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting).

A strict rule of exclusion, on the other hand, will have a direct and immediate impact on law enforcement agents. Since the basis for exclusion is the conduct of the agents, the agents will know precisely when and why their conduct was improper. Moreover, since the rule is applicable only when the procedures employed were unjustified, the agent's conduct can and should be deterred. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

It has been suggested that deterrence, by itself, is insufficient to warrant a constitutional rule excluding evidence obtained through unnecessarily suggestive

confrontation procedures, because no constitutional right is violated by a suggestive confrontation until evidence of it is introduced at trial. *United States ex rel. Kirby* v. *Sturges, supra*, at 406-07. *Stovall*, it is argued, protects only an "evidentiary interest" designed to insure a fair trial, and, unlike *Gilbert*, involves no underlying constitutional deprivation; since the right to a fair trial is violated only when unreliable evidence is admitted against an accused, and absent any independent constitutional infraction to be deterred, a strict deterrent rule, however desirable, is not constitutionally mandated. *Id.* But *see Michigan* v. *Tucker, supra*, at 445-6.

Although the *Gilbert* rule is triggered by a Sixth Amendment violation, it is the need to protect the Fifth and Fourteenth Amendment right to a fair trial against evidence that might otherwise make the trial proceeding a meaningless formality that underlies *Wade* and *Gilbert* and provides the basis for the exclusionary sanction adopted in *Gilbert*.[11] Indeed, Judge Leventhal,

[11]In *Wade*, the Court observed that a confrontation "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial," *Wade, supra*, at 228, and later added that since a witness is unlikely to retreat from his initial out-of-court identification, "the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial." *Id.*, at 229. Indeed, it is clear that the basis for the extension of counsel in *Wade* and *Gilbert* to a pre-trial out-of-court proceeding was the Court's recognition that a post-indictment line-up is a "critical stage" of the proceedings, the results of which "might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.*, at 224.

The Court's unwillingness in *Gilbert* to allow the prosecution to show that no prejudice resulted at the line-up stands in marked contrast to other right to counsel cases where inquiry into lack of prejudice was permitted, Coleman v. Alabama, 399 U.S. 1, 10-11 (1970); Hoffa v. United States, 385 U.S. 293, 308-9 (1966); and reveals the deeper Fifth Amendment interests being protected.

concurring in *Clemons* v. *United States*, *supra*, at 1250-52 (Leventhal, J., concurring), recognized *Stovall*'s "evidentiary interest" but nonetheless stated well the force of the fair trial right: "Identification testimony is a particularly important kind of evidence, so important as to occasion exclusionary rulings that are sweeping in prospective application." *Id.*, at 1251.[12]

The force of the constitutional interest in protecting the right to a fair trial is further underscored by the well-established rule that a coerced confession may not be admitted at trial, no matter how reliable it may be. *Rogers* v. *Richmond*, 365 U.S. 534, 540 (1961); *Lisenba* v. *California*, 314 U.S. 219, 235 (1941). As with evidence of a suggestive confrontation, exclusion of a coerced confession is premised on the constitutional violation that occurs when the confession is introduced at trial, rather than on the existence of a prior constitutional illegality in the procurement of the evidence. *Lisenba*, *supra*. As Justice Harlan pointed out, describing the basis of this rule, in his dissenting opinion in *Mapp* v. *Ohio*, 367 U.S. 643, 684-85 (1961) (Harlan, J., dissenting):

[12]According to Judge Wright, the majority in *Clemons* recognized that a strict rule of exclusion would be applicable to unnecessarily suggestive post-*Stovall* confrontations. Clemons, *supra*, at 1253 (Wright, J., concurring in part and dissenting in part); *accord*: United States ex rel. Phipps v. Follette, *supra*; *see* Clemons, *supra*, at 1237; Russell v. United States, 408 F.2d 1280, 1285 n.25 (D.C. Cir.), *cert. den.*, 395 U.S. 928 (1969). In light of Judge Leventhal's recognition of *Stovall*'s "evidentiary interest," it is significant that he "wholeheartedly" joined in the majority discussion of the post-*Stovall* rule. Clemons, *supra*, at 1250-1 n.1 (Leventhal, J., concurring).

> The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality.

Justice Harlan characterized the rule as "a procedural right," violated only at trial when a coerced statement is admitted against a defendant. *Id.*, at 685.

It is the need to insure the fairness of the trial that underlies the deterrent exclusionary rule of *Gilbert*, in much the same way that it underlies the exclusionary rule of *Rogers* and *Lisenba*. Since the fairness of the trial is threatened equally, if not more so,[13] by suggestive confrontation evidence, a rule excluding evidence of unnecessarily suggestive confrontations has an established constitutional predicate.[14]

[13]Indeed, the likelihood of a fair trial in the face of such evidence is even more gravely threatened than in *Gilbert*, since although a line-up may be fairly conducted without counsel present, a suggestive confrontation is *a priori* unfair.

[14]A related constitutional basis for a strict deterrent rule, also drawn from the Fifth and Fourteenth Amendment right to a fair trial, is found in the Court's recognition that a prosecutor has a constitutional "...duty to refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935). When a prosecutor knowingly manipulates or misrepresents evidence to secure a conviction, the fundamental fairness of a trial is called into question, and a resulting conviction must be set aside. Miller v. Pate, 386 U.S. 1, 7 (1967); Napue v. Illinois, 360 U.S. 264, 269 (1959); Alcorta v. Texas, 355 U.S. 28, 31 (1957).

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Court made clear that prosecutorial mismanagement of evidence prior to

(continued)

It is important to recognize that this Court has already determined that an exclusionary rule is constitutionally required for suggestively obtained out-of-court identification evidence. *Foster* v. *California, supra.* The issue before the Court is only the proper scope of that rule, and, more specifically, the input into the rule of a deterrence factor. Whether or not *Stovall's* "evidentiary interest" can, by itself, sustain a constitutional deterrent rule, recent decisions of this Court make clear that as a prophylactic rule designed to safeguard the Fifth and Fourteenth Amendment right to a fair trial, a deterrent rule can be warranted. *Michigan* v. *Tucker, supra,* at 445-446, 450 (1974); *United States* v. *Calandra,* 414 U.S. 338, 347-52 (1974). These decisions indicate that deterrence may properly justify an exclusionary rule, if, balancing the

(footnote continued from preceding page)
commencement of trial may also violate a defendant's right to a fair trial. Only last term, the Court reaffirmed the constitutional dimension of the prosecutor's obligations in this respect. United States v. Agurs, ___ U.S. ___, 96 S. Ct. 2392, 2399 (1976).

The use of unnecessarily suggestive identification procedures involves a manipulation of evidence very similar to that condemned in prior cases. Suggestive procedures may often produce an identification where one would not otherwise have been forthcoming, Foster v. California, *supra,* or give added certainty to an identification in a doubtful case. *See* Williams and Hammelmann, *Identification Parades, Part I,* (1963) CRIM. L. REV. 479, 482. The consequence of unnecessary use of suggestive procedures may thus well be the manufacture of identification evidence or the manipulation of existing identification evidence into more positive and compelling testimony. To protect the integrity of the trial process, it is therefore constitutionally necessary that evidence willfully or negligently obtained through suggestive identification procedures by a prosecutor be excluded at trial. Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1969).

interests involved, the benefits of the rule outweigh its costs. *Michigan* v. *Tucker, supra,* at 445-46, 450.[15]

In assessing the deterrent value of a strict rule excluding all unnecessarily suggestive confrontation evidence, it is significant that several aspects of the rule indicate it is likely to have considerable practical effect. The rule focuses solely on the conduct of law enforcement officers, and unlike a "totality" rule, which involves external considerations, will provide clear guidelines concerning what procedures are and are not permissible. *See* Grano, 72 MICH. L. REV., *supra,* at 780. The rule admits of simple application and will facilitate judicial review at the trial and appellate levels of challenges to identification testimony.[16] Most important, the rule is aimed at conduct that can be deterred. Unlike the Fourth Amendment exclusionary rule, which, as presently applied, often carries in its sweep good faith or unintentional Fourth Amendment violations, the rule here focuses solely on *unnecessary* police procedures, procedures that are willful or negligent and can and should be prevented. "In such cases, the deterrent value of the rule is most likely to be effective, and the corresponding mandate to preserve

[15]In Michigan v. Tucker, *supra,* at 445-46, the Court employed such an analysis to determine whether an exclusionary rule to deter police conduct that violated the prophylactic *Miranda* standards, *but not the Constitution itself,* was warranted.

[16]While the "totality" rule can easily require a minitrial to determine the reliability of an out-of-court identification, the strict rule will narrow the focus to the procedures employed and the justifications, if any, for the suggestiveness. At the appellate level, review will also be less complex and not require scrutiny of the entire trial transcript.

judicial integrity . . . most clearly demands that the fruit of official misconduct be denied." *Brown* v. *Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring).

A strict exclusionary rule will also minimize, if not eliminate the immediate risk that unreliable confrontation evidence derived from suggestive procedures will be presented to the jury. Since a totality test necessarily involves inquiry into the uncertain areas of individual personality, perception, memory and suggestibility, *see* Levine and Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079, 1087-1131 (1973), it is possible, if not probable, that error will occur, from time to time, in its application. *See* Argument, A-2, *infra*. A strict rule, which excludes all suggestively obtained identification evidence, avoids such error.

A strict rule will, thus, deter improper confrontation procedures, facilitate judicial disposition of due process claims to confrontation evidence, insure that unreliable evidence is not presented to the fact-finder, and uphold the integrity of the judicial system. Counterbalanced against these benefits is the possible interference with the effective prosecution of guilty defendants engendered by a rule that excludes reliable, as well as unreliable, evidence from the trier's consideration. While it is true that a strict rule may, on occasion, require exclusion of reliable confrontation evidence, it is not true that the ultimate harm, acquittal of guilty defendants, will necessarily result.

Presentation to a fact-finder of an out-of-court identification is, of course, not a prerequisite to every conviction, nor will the admission of such evidence

necessarily promote conviction.[17] But even in cases where the admission of out-of-court identification evidence may affect the outcome of a trial, application of a strict rule of exclusion need not significantly burden a prosecution.

Unlike the suppression of illegally seized evidence, which may, in the extreme, terminate a prosecution and, will, at the very least, deprive a prosecution of

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[17]In many cases, suggestive confrontation evidence will not have an affirmative impact on the fact-finder's determination of guilt. The probative value of such evidence is often quite low: even when an out-of-court identification is reliable, the suggestive procedures used to obtain it will vitiate its weight at trial. As one commentator has pointed out, juries are apt to discount suggestive confrontation evidence and may acquit a guilty defendant because doubtful procedures undermine a valid identification. McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 241 (1970). Indeed, often a prosecutor will not offer evidence of a suggestive confrontation, lest an otherwise strong case be weakened. Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pretrial Criminal Identification Methods*, 38 BROOK. L. REV. 261, 269 (1971).

In those cases where the probative weight of the confrontation is high because the witness has identified an individual previously known to him, *see* Wade, *supra*, at 1171 (White, J., dissenting), the need for the out-of-court identification to sustain conviction is low. In such cases, it is the relationship between the witness and the accused that provides the compelling identification evidence; the identification itself takes place at the time of the original identification of the event in question and is merely confirmed at the confrontation. If the factfinder accepts the evidence of the prior relationship between the witness and the accused, evidence of the confrontation is unnecessary. In addition, independent evidence of guilt may be so strong that exclusion of a reliable out-of-court identification of high probative weight will have no bearing on the outcome of the trial.

probative evidence, a prosecution is not necessarily deprived of evidence when a reliable out-of-court identification is excluded at trial. Identification evidence need not be limited to the results of one particular confrontation; unlike physical evidence, which once suppressed cannot be replaced, identification evidence can be effectively duplicated both in and out-of-court with no significant dimunition in probative weight.

As *Wade* and *Simmons* make clear, even if an out-of-court identification is excluded, a prosecutor may still introduce at trial an in-court identification, as long as the in-court identification stems from a source independent of and untainted by the suggestive out-of-court confrontation. More importantly, a prosecutor is free to replace the excluded out-of-court identification evidence with other equally probative out-of-court identification evidence. A prosecutor may conduct any number of confrontations, physical or photographic, prior to or during trial.[18] Just as the existence of an "independent basis" will permit a witness to make an in-court identification after exclusion of a suggestive confrontation, so such an independent basis will permit the admission at trial of out-of-court identification evidence obtained at fairly conducted confrontations held subsequent to the original suggestive confrontation. Since the totality test and the independent basis test rely on the same factors, *compare Neil, supra,* at 199, with *Wade, supra,* at 241,

[18]Indeed, it is not unusual for a prosecutor to conduct a photographic confrontation prior to trial to determine a witness' ability to make an in-court identification. *See* United States v. Ash, 413 U.S. 300, 303 (1973).

if the original confrontation was "reliable" and therefore admissible under a "totality" test, an independent basis for a subsequent in or out-of-court identification will always exist.

Although there would necessarily be a passage of time between the original suggestive confrontation and any subsequent confrontations, this interval would not significantly undermine the impact of the identification evidence. While it may be that identification evidence has more weight with a jury when the identification is made close in time to the event witnessed, *cf.*, *Russell* v. *United States,* 408 F.2d 1280 (D.C. Cir. 1968), *cert. den.*, 395 U.S. 928 (1969),[19] if the subsequent confrontation is conducted reasonably near in time to the original confrontation, it is likely that the presumed detrimental impact of the passage of time would be equalled, if not outweighed by the positive impact resulting from the fairness of the procedures at the subsequent confrontation. *See* McGowan, *Constitutional Interpretation and Criminal Identification,* 12 WM. & MARY L. REV. 235, 241 (1970). Furthermore, prompt prosecutorial review of identification procedures in a particular case will forestall a significant interval between the first and second confrontation. Thus, not only can excluded out-of-court identification evidence be replaced, it can be replaced with no significant cost to a prosecution.

[19]On-the-scene show-up identifications, even though suggestively obtained, would not be excluded under a strict rule, since such identifications have been held to be justified by the inherent reliability of a proceeding conducted when recollection is especially fresh. Russell v. United States, *supra,* at 1284.

A strict rule of exclusion of identification evidence is thus quite different in impact than a rule excluding illegally seized tangible evidence. The probative force of excluded physical evidence cannot be replaced and is often critical to a prosecution; the reliability of such evidence is unquestioned; and its acceptance by the fact-finder is in little doubt. An identification procured by means of suggestive procedures is of uncertain reliability, may well be discounted by the jury, and most important, can be easily replaced with little cost to the prosecution by the results of subsequent in and out-of-court confrontations.

A strict rule of exclusion of improperly obtained confrontation evidence does not impose a significant cost on the trial process. Since, on the other hand, it provides substantial benefits, it is constitutionally mandated to implement the Fifth and Fourteenth Amendment right to a fair trial. *Michigan* v. *Tucker*, *supra*; *Gilbert* v. *California*, *supra*.

2. A Strict Rule is Constitutionally Mandated to Insure Effective Identification and Exclusion of Unreliable Confrontation Evidence.

Although support for a strict rule generally centers on its deterrent value, a more fundamental rationale compels its adoption. The immediate purpose of a rule, strict or selective, excluding identification evidence derived from suggestive procedures is the exclusion at trial of unreliable identification evidence and the consequent prevention of unjust convictions. A constitutionally adequate rule must therefore guarantee *effective* identification and exclusion of such unreliable

evidence. The "totality" rule fails to fulfill this constitutional function.

The accuracy of an inquiry into the reliability of an identification derived from suggestive procedures has been the subject of substantial legal and psychological challenge, since the "totality" rule was announced in *Neil* four years ago. *See* Grano, 72 MICH. L. REV., *supra*, at 724, 735-37, 749; Pulaski; 26 STAN. L. REV., *supra* at 1097-98; Levine and Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079, 1087-1131 (1973); *cf.*, *United States* v. *Wade*, 388 U.S. 218, 247-248 (1967) (Black, J., concurring and dissenting). The rule's underlying premise, that judges are capable of assessing the impact on a witness of suggestive procedures, has been sharply disputed by psychologists who contend that in the majority of cases the impact of suggestiveness is dependent on unknown individual personality factors which cannot be quantified by trained psychologists, much less judges. *Id.*; *see* also Doob and Kirshenbaum, *Bias in Police Lineups--Partial Remembering*, 1 J. POLICE SCI. & ADMIN. 287 (1973); Stern, 34 J. AB. NORM. & SOC. PSYCH. 3 (1939). Legal commentators have further argued that too often independent evidence of guilt or innocence is relied upon by judges to find an identification reliable. *See*, *e.g.*, Grano, 72 MICH. L. REV., *supra*, at 780.

The "totality" test assumes that identification evidence derived from suggestive procedures is subject to easy location on a continuum, which starts at the point where suggestiveness has no influence on an identification and ends at the point where suggestiveness, not recollection, produces the identification. In fact, such is clearly not the case. In cases where the

witness knows the suspect prior to the crime, and thus is being asked merely to confirm the identification of a known suspect, rather than establish the identity of an unknown suspect, suggestiveness plays no part. In all other cases, where the identity of the suspect is unknown, suggestiveness is always a factor of uncertain significance.

Indeed, the imprecise nature of a "totality" inquiry into reliability is underscored by the repeated instances of judicial disagreement over the proper application of the test to a particular fact situation. *See, e.g., Brathwaite* v. *Manson, supra; United States ex rel. Cannon* v. *Smith,* 527 F.2d 702 (2d Cir. 1975); *Smith* v. *Coiner, supra; Rudd* v. *Florida,* 477 F.2d 805 (5th Cir. 1973); *United States* v. *Russell,* 532 F.2d 1063 (6th Cir. 1976); *Holland* v. *Perini,* 512 F.2d 99 (6th Cir.), *cert. den.,* 423 U.S. 934 (1975); *United States* v. *Bowie,* 515 F.2d 3 (7th Cir. 1975); *Sanchell* v. *Parratt,* 530 F.2d 286 (8th Cir. 1976); *United States* v. *Dailey,* 524 F.2d 911 (8th Cir. 1975); *Thomas* v. *Leeke,* 393 F. Supp 282 (D.S.C. 1975); *Dixon* v. *Hopper,* 407 F. Supp 58 (M.D.Ga. 1976). The social cost of even one mistaken determination can be substantial; the costs of the continued use of an unworkable test are staggering.

A strict rule excluding all evidence derived from suggestive confrontation procedures does not require such uncertain inquiry into the psychological factors that produce an identification. A strict rule will thus minimize, if not eliminate, the risk that unreliable evidence will be presented to the jury and will serve as the basis for a conviction.

This criticism of the "totality" rule does not imply that *Neil,* which adopted such a rule, was wrongly decided. In *Neil,* the Court intentionally framed a

narrow rule designed to limit interference with convictions based on identification evidence obtained prior to *Stovall.* The need to reach all improper convictions was therefore tempered by the Court's understandable reluctance to adopt a rule that would result in substantial disruption of possibly legitimate convictions.[20] The *Neil* rule is thus analagous in scope to a "harmless error" determination, the relevant inquiry not whether a mistake was made but whether the mistake had a likely impact on the outcome of the trial. For cases involving post-*Stovall* confrontation evidence, the need for a narrow rule disappears, and a rule that maximizes exclusion of all potentially unreliable identification evidence derived from suggestive procedures is constitutionally mandated.

A strict rule of exclusion of out-of-court identification evidence derived from unnecessarily suggestive confrontation procedures is constitutionally mandated to deter the future use of improper procedures and minimize the admission at trial of unreliable identification evidence. In this case, involving a post-*Stovall* confrontation, the Second Circuit Court of Appeals correctly applied such a rule, and its holding should be affirmed.

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[20]The Court also recognized the difficulty a prosecutor might have in demonstrating the fairness of a pre-*Stovall* confrontation, since the trial record would not have been developed with *Stovall's* considerations in mind and supporting testimony might be unavailable years later. Neil *supra,* at 200.

B. THE COURT OF APPEALS DID NOT EXCEED THE PROPER SCOPE OF APPELLATE REVIEW IN HOLDING THAT THE PHOTOGRAPHIC IDENTIFICATION PROCEDURE USED TO OBTAIN AN IDENTIFICATION OF RESPONDENT CREATED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

As an independent basis for reversing the district court and ordering the writ to issue, the court of appeals held that the photographic identification procedure employed to obtain Glover's identification testimony was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Although, in reaching this alternative holding, the court of appeals straightforwardly applied the *Neil* "totality" test, petitioner contends that the court of appeals exceeded the proper scope of its appellate review and improperly substituted its appraisal of the facts for that of the state trier of fact and federal district court judge. Petitioner's claim is premised upon the erroneous assumption that the issues involved in this case center around factual determinations as opposed to legal conclusions.

Respondent's habeas corpus petition sought relief on the ground that the admission at his state trial of identification testimony derived from an unnecessarily suggestive identification procedure had violated his due process rights. This was a legal question to be determined by the reviewing judge, after careful analysis of the facts. Thus, the federal district court judge considered the transcript of the state court trial and, applying the "totality" test of *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972), held that although the procedures

used to obtain the identification evidence were unnecessarily and impermissibly suggestive, no substantial likelihood of misidentification had occurred. The court of appeals considered the same trial transcript in reaching the opposite conclusion.

"The dispute between the parties [was] not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil, supra,* at 193 n. 3. Indeed, although the court of appeals disagreed with the district court's legal conclusion, it did not reverse a single finding of fact by the district court.

That the appellate court reached a different conclusion than the district court does not invalidate its decision. The appellate court was not bound, as petitioner suggests, by the legal interpretation given to the facts by the district court. *United States ex rel. Davis* v. *Johnson,* 495 F.2d 335 (3d Cir.), *cert. den.*, 419 U.S. 818 (1974). There was no evidentiary hearing held in the lower court, and so the district court judge was in no better position to assess the credibility or demeanor of witnesses than was the appellate court. Since the court of appeals' reasoning was based upon the same state trial transcript as was the district court's, the court of appeals was not required to give deference to the lower court's findings. *Wade* v. *Wainwright,* 450 F.2d 409 (5th Cir. 1971).

If the issue presented by this case were whether the evidence at trial was legally sufficient to sustain respondent's conviction, petitioner's argument might have some merit. Under such circumstances, assuming habeas corpus jurisdiction, the reviewing district court and the court of appeals would have both been enjoined to evaluate the evidence in the light most

favorable to the state, giving proper regard to the state jury's right to decide disputed questions of fact. The issue here is not, however, one of sufficiency of evidence. Respondent's claims called for a legal analysis of whether the photographic identification was suggestive, and, if so, whether such a procedure created a substantial likelihood of misidentification. As the *Wade* trilogy made clear, such a determination is, in the first instance, solely a question of legal admissibility for the court.

Nor is there any doubt that, in exercising its proper review, the court of appeals correctly applied the test set forth in *Neil* v. *Biggers, supra,* at 199, in concluding that the suggestiveness of the unnecessary photographic show-up employed by the police in this case created a substantial likelihood of misidentification. If the test set forth in *Neil* is to be the test even for post-*Stovall* confrontations, and if the test is to have any significance, this Court must agree that the facts of this case compel affirmance of Judge Friendly's opinion.

At respondent's trial, the only issue was the identity of the person who sold the drugs. This issue was determined solely[21] on the basis of identification

[21]There was no evidence, other than Glover's identification testimony, that implicated respondent in the sale. The testimony of the state's other witnesses undermined Glover's credibility. Brown, the state's undercover informant, who was described as "trustworthy" by Glover [T. 47], testified the transaction was conducted with a woman, not a man. Gaffey testified that he had instructed Glover to go to the apartment on the left side of the hallway, while Glover admitted that he bought drugs from someone in the apartment on the right. There were no fingerprints, admissions or confessions relating to respondent, nor was there any allegation that respondent was a known drug user or dealer. *(continued)*

evidence derived from a photographic procedure that has been condemned as "the most suggestive and therefore the most objectionable method of pre-trial identification." *Kimbrough* v. *Cox,* 444 F.2d 8, 10 (4th Cir. 1971),[22] and which petitioner concedes was unjustified in the circumstances of this case.

This Court has specifically warned of the dangers inherent in identification proceedings involving one photograph:

> Even if the police subsequently follow the most correct photographic procedures and show [a witness] the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw. . .
>
> *Simmons* v. *United States, supra,* at 383.

(footnote continued from preceding page)

Respondent himself denied commiting the crime and gave an explanation of his whereabouts on the day of the crime which was supported by several witnesses and not contradicted by a single rebuttal witness for the state. Respondent's character was never impeached during his testimony, since his only prior criminal involvement was a minor breach of the peace charge.

[22]Other circuits have similarly condemned photographic show-ups. *See, e.g.,* United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973), *cert. den.*, 414 U.S. 924 (1974); Workman v. Cardwell, 471 F.2d 909 (6th Cir. 1972), *cert. den,* 412 U.S. 932 (1973); United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976); United States v. Cook, 464 F.2d 251 (8th Cir.), *cert. den.*, 409 U.S. 1011 (1972); United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969).

D'Onofrio's use of this procedure was, as petitioner admits, wholly unnecessary. Although two days elapsed between the sale and the confrontation, there was no attempt made by D'Onofrio or any other officer to construct a proper photographic display or line-up. Since Glover was readily accessible to D'Onofrio, and since D'Onofrio claimed to have known the whereabouts of Brathwaite [T. 70], no emergency compelled rejection of these fairer and more reliable alternatives.

Nor does the fact that Glover was a police officer, and presumably a trained observer, excuse the suggestive procedure. *Neil* certainly did not intend to exempt from scrutiny identifications made by police officers. This was not a case where undercover investigation had produced a long-standing relationship between Glover and respondent or where Glover's identification was merely a confirmation of the identity of a person previously known to him. To the contrary, the seller had not been under prior surveillance, and neither Glover nor D'Onofrio knew the identity of the seller at the time of the sale. Furthermore, Glover was not a victim, *see United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975), or an uninvolved bystander, but rather "an undercover agent whose business was to cause arrests to be made." *Brathwaite* v. *Manson*, *supra*, at 371. As the court of appeals properly observed, Glover's possible incentive to make an identification cannot be lightly dismissed.[23]

[23]Glover had expended police department money for the purchase of drugs, and an identification and arrest were expected as a result.

When D'Onofrio placed respondent's picture at the police station for Glover to identify, Glover knew that respondent was the prime, if not only, suspect in the case, as well as D'Onofrio's personal choice as the seller. The impact of this suggestiveness on Glover's subsequent identification cannot be ignored,[24] *see United States ex rel. Kirby* v. *Sturges*, *supra*, at 403, and it was all but inevitable that Glover would identify respondent "whether or not he was in fact 'the man.'" *Foster* v. *California*, *supra*, at 443.

Because the impact of the suggestiveness can never be precisely measured, every identification resulting from a photographic show-up must be examined warily and admitted at trial only if there are no factors pointing toward a likelihood of misidentification. Not only was the identification procedure employed in this case highly suggestive and totally unnecessary, but numerous other factors point toward a very substantial likelihood of misidentification.

Glover had an extremely limited opportunity under poor lighting conditions to view the seller at the time of the transaction. Glover saw the subject on two very brief occasions behind a door that was opened only twelve to eighteen inches [T. 29]. There was no

[24]Although *Neil* does not include the suggestiveness of the procedure as a separate element in its five factor test, it must be emphasized at the outset that such suggestiveness plays an important role in the determination of whether an identification is reliable. *See* Clemons, *supra*, at 1245 n. 16. Several courts have even indicated that a photographic show-up is so suggestive that it will always give rise to a substantial likelihood of misidentification, warranting per se exclusion of all photographic show-up evidence. United States v. Fowler, *supra*; United States v. Workman, 470 F.2d 151 (4th Cir. 1972).

artificial light in the hallway where Glover was standing [T. 28], nor was there any light coming from inside the apartment to help illuminate the scene [T. 33]. The natural light in the hallway was limited since the sun was setting at the time of the alleged sale [*Brathwaite* v. *Manson, supra,* at 371].

Most importantly, Glover did not look at the seller for "two to three minutes," as petitioner suggests, but, as the trial record indicates, only long enough for three short sentences to be spoken [T. 30, 31] and for the exchange to occur [T. 32]. Glover and Brown arrived outside the apartment building at 7:45 p.m. [T. 10]. At 7:53 p.m. they had returned to their automobile [T. 11], having been inside the building for a total of "three to four minutes [T. 60]." Since Glover testified at least three of these minutes were consumed by waiting in front of a closed door for the seller to reappear with the drugs [T. 31], and since some of this time must also have been spent climbing up and down three flights of stairs, it is evident that at most, Glover had a brief glimpse of the alleged seller.

Moreover, during this brief encounter, Glover's attention was not directed solely upon the seller. When the door first opened, he was confronted with two persons, not just one [T. 31], and, during the second short viewing, Glover was necessarily forced to concentrate on the transfer of drugs [T 32].

Glover's description of the seller was not so detailed as to distinguish this person from countless other black males in the Hartford area. Glover described the seller as "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of a heavy build. He was wearing at the time blue pants and a

plaid shirt [T. 36-37]." Absent is any indication of the approximate age of the seller or any other distinctive identifying characteristics he may have had. Although Brathwaite was suffering from a facial tic on May 5, 1970 [T. 139], and although he was a native of Barbados in the British West Indies [T. 99], there was no mention by Glover that the seller had any unusual physical ailments or any foreign characteristics.

The weight to be given the apparent certainty of Glover's identification of Brathwaite at trial is negligible. When Glover identified Brathwaite during the trial, Brathwaite was the only black male sitting at the defense table, and thus identification was inevitable. The certainty of Glover's in-court identification was further undermined by petitioner's admission at oral argument before the court of appeals that prior to commencement of the trial, Glover again viewed the single photograph of Brathwaite. During the eight months between the transaction and the trial, Glover most probably made dozens of identifications and arrests. The probability that he would have remembered this seller so positively, absent the first and second viewing of Brathwaite's photograph and absent any viewing of the seller prior to or subsequent to the incident, is remote.

The length of time between the crime and confrontation also militates against the reliability of Glover's out-of-court identification. For no apparent reason D'Onofrio waited two days before conducting the photographic show-up. Had Glover made the identification the same night as the transaction, his

recollection of the seller would have been more acute,[25] and the impact of the suggestive show-up might have been less significant. After forty-eight hours, however, Glover's identification of Brathwaite from a single photograph is of tenuous value.[26]

Taken together, these are the factors which Judge Friendly carefully evaluated in determining that the risk of mistaken identification in this case was too unacceptably high to permit the conviction to stand. Far from substituting its judgment for that of the state trier of fact or reversing findings of fact made by the district court, the court of appeals reviewed the same record that was before the district court and reached a different conclusion on a question that was plainly within the proper scope of its appellate review.

[25] Although a show-up conducted within minutes after a crime has been committed has generally been upheld, Russell v. United States, *supra*; Stewart v. United States, 418 F.2d 1110 (D.C. Cir. 1969), it is clear that a two day delay between observation and confrontation falls outside the rationale of such cases, since recollection is no longer fresh, nor the need for a "prompt" identification applicable. *See* McCrae v. United States, 420 F.2d 1283, 1290 (D.C. Cir. 1969), where a show-up held four hours after the crime was invalidated because the "nexus of time and place between offense and identification had become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses."

[26] At trial, Glover also made an in-court identification of respondent as the seller [T. 33]. Admission of this evidence was also constitutional error, since, for the reasons discussed with respect to the reliability of the out-of-court identification, no independent basis for the in-court identification can be found. *Compare Neil, supra,* at 199, with *Wade, supra,* at 241. Furthermore, *Neil* makes clear that admission of the out-of-court identification, if error, would require reversal of respondent's conviction. *Neil, supra,* at 198 n. 5.

The court of appeals' holding was correct and should be affirmed by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays that the judgment of the court below be affirmed.

Respectfully submitted,

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